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No. 87-601

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAUL HEBERLE BRACKEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's failure to instruct the jury that a witness's prior inconsistent statement was admissible only for purposes of impeachment constitutes plain error in the circumstances of this case.

2. Whether the evidence adduced at trial was sufficient to support petitioner's conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987. The petition for a writ of certiorari was filed on September 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of conspiring to provide marijuana and heroin to inmates at the Federal Correctional Institution in El Reno, Oklahoma, in violation of 18 U.S.C. 371 and 1791. He was sentenced to five years' imprisonment, to be served consecutively to other federal and state sentences previously imposed.

1. The evidence adduced at trial showed that in late April 1985 officials at the Federal Correctional Institution in El Reno, Oklahoma, received information indicating that Katrina Lachelle Lloyd had used the name of petitioner's sister—Yvonne Justice—in order to smuggle narcotics to petitioner, who was then an inmate at the facility (Tr. 24-25, 40-41, 49, 113). Lloyd appeared at the prison on May 5, 1985, with petitioner's brother-in-law, Edward Justice (Tr. 37, 63-64). Lloyd signed in to visit petitioner using the name Yvonne Justice, as she had apparently done on more than 20 prior occasions (Tr. 21-23, 25, 101, 224). She was detained and searched by prison officials (Tr. 25, 29-30). Two golf-ball-sized objects wrapped in gray duct tape and covered with cellophane were recovered from Lloyd's undergarments (Tr. 31, 35, 43). Subsequent examination established that the balls contained 4.3 grams of marijuana and twelve capsules of heroin (Tr. 55, 57, 59). Lloyd also was found in possession of an identification card in the name "Yvonne Justice" that bore Lloyd's photograph (Tr. 39). She carried a Western Union money transfer payment request in the amount of $100, payable to "Katrina Lloyd," and $671 in cash (Tr. 49, 79). A search of the vehicle driven by petitioner's brother-in-law yielded a quantity of balloons, loose marijuana, gray duct tape, and cellophane (Tr. 37-38).

Lloyd subsequently made an oral statement to FBI agents that implicated petitioner and two other individuals in a conspiracy to introduce controlled substances into the prison (Tr. 105, 106). She stated that she received $200 on five separate occasions for carrying drugs into the facility (Tr. 107). Lloyd stated that on May 5 she was carrying a napkin with petroleum jelly that petitioner planned to use to lubricate the packages so that he could insert them into his rectal cavity and smuggle them past the guards (Tr. 75, 108). Prior to petitioner's trial, Lloyd pleaded guilty to introducing contraband into the prison (Tr. 61).

2. When called by the government as a witness at petitioner's trial, Lloyd completely changed her story. She testified that she had smuggled narcotics into the prison only once prior to May 5, 1985, and that she had not brought the drugs for petitioner. She stated that the drugs were to be delivered to inmate Johnny Hugh Eaton, a government informant and witness, in order to settle a debt that petitioner owed to Eaton (Tr. 67, 69-71, 73, 88-89, 91, 100). She explained that the Western Union money order was to be her payment for delivering the drugs to Eaton (Tr. 70). Lloyd admitted that Eaton was not in the visiting room to receive drugs on May 5, but she maintained that petitioner had no knowledge of her plans to smuggle the narcotics and that she intended merely to ask his "opinion" on the matter (Tr. 73). When confronted with her earlier statement implicating petitioner, Lloyd claimed to have lied to the FBI (Tr. 72).

Following Lloyd's testimony, FBI Agent Brown testified to the discrepancy between Lloyd's earlier statement and her testimony at trial (Tr. 105-108). Petitioner's trial counsel did not object to Agent Brown's testimony and did not request that the jury be instructed that Agent Brown's testimony was being admitted for the limited purpose of impeaching Lloyd.

Eaton subsequently testified that he was acquainted with petitioner and that he decided to inform prison officials about the actions of petitioner and Lloyd because petitioner had failed to repay a loan (Tr. 110-111, 113). Eaton had seen Lloyd delivering drugs to petitioner in the visiting room (Tr. 115). He also testified that Lloyd smuggled drugs almost every time she visited petitioner (Tr. 129, 131).

3. The court of appeals affirmed petitioner's conviction (Pet. App. 1-13). The court first rejected petitioner's claim that the evidence was not sufficient to support the conviction. "Taking the evidence as a whole," the court

held, "a reasonable jury could infer that [petitioner] had an agreement with Ms. Lloyd to provide drugs to him in prison throughout the period of her visits" (*id.* at 7).

The court of appeals next considered petitioner's claim that the trial court erred by failing to instruct the jury that Lloyd's prior inconsistent statement was admissible only for impeachment purposes. The court observed that the plain error standard applied because petitioner did not request a limiting instruction at trial. The court then found there was no plain error in the circumstances of this case. Relying upon *United States* v. *Lipscomb*, 425 F.2d 226 (6th Cir. 1970), the court stated that "[w]ithout evidence to support the elements of the crime *other* than the prior inconsistent statement, failure to instruct the jury that the statement cannot be considered as substantive evidence of the [relevant] facts is plain error" (Pet. App. 11 (emphasis in original)). "If, however, the Government has provided substantial evidence other than the prior inconsistent statement to establish the elements of the offense, failure to give a limiting instruction to the jury is not plain error" (*id.* at 11-12). The court found that in the present case "[t]he weight of the evidence coupled with [petitioner's] failure to request a limiting instruction convinces us that the court's omission of a limiting instruction with respect to the impeachment testimony does not constitute plain error" (*id.* at 13).

ARGUMENT

1. a. Petitioner asserts (Pet. 6-7) that the district court committed reversible error by failing to instruct the jury that Lloyd's prior inconsistent statement was admissible only for impeachment purposes. Because petitioner failed to request such an instruction at trial, his conviction may be reversed only if the district court committed plain error (see Fed. R. Crim. P. 52(b)).

"The plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citation omitted). Accordingly, each case must be examined on its own facts and the contemporaneous-objection rule relaxed only where the error "undermine[s] the fundamental fairness of the trial and contribute[s] to a miscarriage of justice" (*id.* at 16).

Several courts of appeals have concluded that where the government has introduced substantial evidence establishing the defendant's guilt, failure to instruct the jury that a prior inconsistent statement may be considered only for impeachment purposes does not constitute plain error. *United States* v. *Miller*, 664 F.2d-94, 98 (5th Cir. 1981), cert. denied, 459 U.S. 854 (1982); *United States* v. *Benton*, 637 F.2d 1052, 1059 (5th Cir. 1981); *United States* v. *Orrico*, 599 F.2d 113, 117-118 (6th Cir. 1979); *United States* v. *Lipscomb*, 425 F.2d 226 (6th Cir. 1970). The court below applied the same standard here and correctly concluded that the government had introduced sufficient independent evidence of petitioner's guilt (see Pet. App. 11-13).[1]

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[1] The government's case was not based upon Lloyd's prior inconsistent statement, and the government did not invite the jury to consider the prior inconsistent statement as substantive evidence. Moreover, the government introduced abundant evidence establishing petitioner's participation in the drug conspiracy (see Pet. App. 6-7): inmate Eaton's testimony that he had seen Lloyd pass drugs to petitioner on numerous occasions (Tr. 129, 131); Lloyd's admission that she had smuggled narcotics into the facility on at least one prior occasion (Tr. 67); testimony indicating that Lloyd had never visited any inmate other than petitioner (Tr. 48, 66-67); and evidence that the car in which Lloyd rode to the prison on May 5 was laden with drug smuggling paraphernalia (Tr. 74).

b. Petitioner contends that the decision below conflicts with *United States* v. *Lipscomb, supra,* and *United States* v. *Lewis*, 693 F.2d 189 (D.C. Cir. 1982). He asserts that those decisions held that failure to give an instruction limiting the evidentiary use of a prior inconsistent statement is always plain error. As the court of appeals made clear (Pet. App. 9-11), *Lipscomb* did not announce any such per se rule. The *Lipscomb* court stated that "[a]lthough such [a limiting] instruction was not specifically requested, it has generally been held that failure to give it amounts to plain error where, as here, *the government's case is weak and the statement is extremely damaging*" (425 F.2d at 227 (emphasis added)). The finding of plain error in *Lipscomb* was thus based on the fact that "the testimony brought out during the impeachment process established in large measure the substantive elements of the crime which the government was required to prove" (*ibid.*). As the court of appeals stated, *Lipscomb* therefore stands for the narrow proposition that "[w]ithout evidence to support the elements of the crime *other* than the prior inconsistent statement, failure to instruct the jury that the statement cannot be considered as substantive evidence of the relevant facts is plain error" (Pet. App. 11 (emphasis in original)).

The issue in *United States* v. *Lewis*, 693 F.2d 189 (D.C. Cir. 1982), was whether the district court erred in admitting, for a limited purpose, evidence that the defendant had engaged in illegal acts not charged in the indictment. In affirming the defendant's conviction, the court of appeals rejected the contention that a limiting instruction is necessary every time evidence is admitted that the jury could conceivably use improperly. The only discussion of impeachment testimony in *Lewis* is contained in a brief footnote, in which the court stated that when a party seeks to impeach a witness by a prior inconsistent statement, "it is plain error not to give an immediate limiting instruction

if the jury could give substantive effect to the impeachment evidence" (*id.* at 197 n.34). That statement is clearly dictum. In addition, *Lewis* was decided prior to this Court's decision in *Young*, which makes clear that the plain error determination cannot be made without reference to the facts of each particular case (see 470 U.S. at 16).

2. Petitioner's challenge to the sufficiency of the evidence to support his conviction (Pet. 7) must also be rejected. The court below carefully reviewed the facts adduced at trial and found the evidence against petitioner sufficient to establish his guilt (see Pet. App. 3-7). Because "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals" (*Hamling* v. *United States*, 418 U.S. 87, 124 (1974)), this issue does not merit further review by this Court. In any event, the evidence was plainly sufficient. Eaton's testimony directly inculpated petitioner, and it was corroborated both by Lloyd's admissions that she was smuggling drugs into the prison and the evidence that petitioner was the only prisoner she was permitted to visit (see Pet. App. 6).[2]

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[2] Petitioner's assertion (Pet. 7) that testimony of co-conspirators may not be considered in assessing the sufficiency of the evidence to support a conviction is simply wrong. All properly admitted evidence may be considered by the reviewing court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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